IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1794

STATE OF NEW JERSEY,

Petitioner,

v.

EDWARD O'HERRON, JR. and
KATHLEEN O'HERRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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The petitioner State of New Jersey respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on November 4, 1977.

Opinion Below

The following proceedings of the state courts are reproduced in the appendix: the order of the Supreme Court of New Jersey denying leave to appeal, not yet reported, and the opinion of the Superior Court of New Jersey, Appellate Division, reported at 153 N.J. Super. 570, 380 A.2d 728 (App. Div. 1977).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 17, 1978, and this petition for certiorari is being filed within 150 days of that date pursuant to an extension of time granted by Mr. Justice Brennan. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Question Presented

1. Does the doctrine of expectation of privacy override the concept of constitutionally protected areas so as to permit a warrantless seizure of contraband in open view from a public thoroughfare?

Statement of the Case

Respondents were indicted for possession of a controlled dangerous substance, to wit, marijuana, in violation of N.J.S.A. 24:21-20a(4). Pursuant to Respondents' pretrial motion, the trial court ordered the marijuana suppressed. This order was affirmed on appeal by the Appellate Division and the New Jersey Supreme Court denied leave to appeal.

The facts are not controverted. On the evening of July 20, 1976, an anonymous caller informed the Hazlet Police Department that marijuana plants were growing in a vegetable garden at 169 Eighth Street, West Keansburg, New Jersey. Patrolman Strass and Sergeant Sullivan were dispatched to that address to investigate the tip. They observed a garden and decided that it should be investigated by two of Hazlet's detectives.

At approximately 11:15 the next morning, Detectives John Allen and Robert Mulligan went to the address, where, from the roadway, they observed large green plants growing in the Respondents' garden. To obtain a closer look, Detective Allen went around the back and came through a neighbor's property behind the O'Herrons' home. While still not on Respondents' property, the detective observed two plants growing in their rear yard which from his past experience he identified as marijuana.

The detectives notified headquarters and additional officers were dispatched to the scene. The detectives then entered Respondents' garden, further examined the plants and gathered them as evidence.

Respondents moved to suppress the evidence, arguing that *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971),

reh. denied 404 U.S. 874 (1971) mandated that a "plain view" be "inadvertent," and therefore the officers should have obtained a search warrant. (T15-4 to T16-6). The State maintained that the plain view doctrine as espoused in *Harris* v. *United States,* 390 U.S. 234 (1968) was the controlling precedent, and that the plain view does not have to be inadvertent in all cases, despite ambiguous language to the contrary in *Coolidge.* (T9-5 to 17). The trial court granted the motion to suppress, basing its decision on its interpretation of *Coolidge.* (T18-1 to T19-4).

The Appellate Division affirmed the trial court's order, ruling that "a 'plain view' observation made without intrusion into a constitutionally protected location does not justify a warrantless intrusion and seizure." (A. 12). In so holding the court necessarily found that a back yard is entitled to traditional Fourth Amendment protections. These conclusions permitted the court to avoid deciding whether "plain view" must be "inadvertent." Compare *Coolidge* v. *New Hampshire, supra,* with *Harris* v. *United States,* 390 U.S. 234 (1968). The court declined to apply the rationale expounded in *Katz* v. *United States,* 389 U.S. 347 (1967), to determine whether there was an intrusion into a area where Respondents possessed a reasonable expectation of privacy. Rather, the court noted the theoretical tension between *Katz* and *Coolidge,* and opted for the latter's concept of plain view. Finally, the Appellate Division rejected the contention that some exigency is created by the existence *per se* of contraband. The New Jersey Supreme Court denied Petitioner's motion for leave to appeal.

The present petition evinces "final judgment" for purposes of review, for nothing remains save the entry of an order dismissing the indictment. See *Mills* v. *Alabama,* 384 U.S. 214, 217-218 (1966).

REASONS FOR GRANTING THE WRIT

POINT I

A police officer may make a warrantless entry onto private property to seize contraband clearly visible to him from a public thoroughfare when no reasonable expectation of privacy is manifested.

In order to uphold the suppression of the marijuana plants seized from Respondents' garden, the Appellate Division ruled that "a 'plain view' observation made without intrusion into a constitutionally protected location does not itself justify a warrantless intrusion and seizure." *State* v. *O'Herron,* 153 N.J. Super. 570, 581, 380 A.2d 728, 733 (App.Div. 1977) (A. 12). Adherence to this legal standard renders nugatory the doctrine of "plain view" as it relates to warrantless seizures since virtually all such actions occur within constitutionally protected zones.

Insofar as this holding accords an inflexible measure of Fourth Amendment protection to the area surrouding a dwelling, it is seriously in conflict with developing notions of privacy first articulated by this Court in *Katz* v. *United States,* 389 U.S. 347 (1967). In Petitioner's view, the Appellate Division erred by failing to analyze the seizure of the contraband within the *Katz* framework of Respondents' reasonable expectation of privacy. By utilizing instead the concept of "constitutionally protected areas," the court has failed to give adequate recognition to the admonition in *Katz* that such a concept cannot "serve as a talismanic solution to every Fourth Amendment problem." 389 U.S. at 351 n.9. In short, Petitioner contends that the individual who openly displays contraband to the public gaze is not entitled to automatic Fourth Amendment protection simply because he has chosen to situate it near his

private dwelling. Petitioner further contends that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." *Harris* v. *United States,* 390 U.S. 234, 236 (1968).

Of course, the yard surrounding a home is neither a public thoroughfare, to which no constitutional protection attaches, nor is it physically part of a dwelling, to which maximum protection attaches. See, *e.g., Katz, supra* at 351 n.8. When a citizen closes his door to the outside world he can expect the highest degree of privacy known to our society. *Commonwealth* v. *Flewellen,* —— Pa. ——, 380 A.2d 1217, 1220 (Pa. 1977). This expectation of privacy is considerably greater than that which attaches to his driveway, front porch or lawn. *Britton* v. *State,* 336 So.2d 663 (Fla. App. 1976). Moreover, with increasing urbanization, the degree of privacy that an individual may legitimately expect diminishes proportionally. *United States* v. *Johnson,* 561 F.2d 832, 851 (D.C. Cir. 1977) (en banc) (concurring opinion), *cert.* den. —— U.S. ——, 97 S.Ct. 2953 (1977) [noting the frequency with which a city lawn is crossed].

The present petition involves a suburban area. Respondents live in a modest house surrounded by a small yard. Their land is bounded by neighboring homes. From the street a passerby can view their front and side property; from the yard belonging to a neighbor, the O'Herrons' rear yard may be observed. Utilizing these two vantage points, the police were able to observe marijuana growing in the side and rear gardens prior to any intrusion on the O'Herrons' property.

At the heart of Petitioner's argument is the simple proposition that Respondents had no legitimate expectation of privacy in the foliage which they chose to grow unconcealed

on their property. Beyond doubt, suburban house dwellers plant extensive and varied greenery around their homes in the expectation that it will augment their property and with the full awareness that their plantings will be visible to the neighborhood. Unless they surround their property with a wall, the occupants must be held to the knowledge that their shrubbery, including their contraband plants, will be in the public eye. See *State* v. *Stachler,* —— Haw. ——, 570 P.2d 1323 (Haw. 1977) [no reasonable expectation of privacy from aerial overflight for crop of marijuana planted in vegetable fields]. For this reason, Petitioner submits that the marijuana plants growing in Respondents' vegetable garden within view of the street could be seized without a warrant, for "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra* at 351.

As a concomitant to our argument that the present seizure should be analyzed in terms of the reasonable expectation of privacy of the individual, Petitioner urges abandonment for Fourth Amendment purposes of the common law notion of curtilage. Originally signifying the "land with the castle and out-houses, enclosed often with high stone walls," *Coddington* v. *Dry Dock Co.,* 31 N.J.L. 477, 485 (Err. & App. 1863), the concept of curtilage has been used in modern times to designate those portions of the lands around a dwelling which are within the shelter of the Fourth Amendment protection accorded the dwelling itself. The difficulties with the curtilage approach are several. First, it leads to a measurement of Fourth Amendment protection in feet and inches, rather than in terms of the reasonableness of the intrusion. See *United States ex rel. Saiken* v. *Bensinger,* 546 F.2d 1292, 1296 (7 Cir. 1976) [containing a chart of distances held to be within and without the curtilage in various precedents]. Second, the doctrine has

scant applicability to urban or suburban life, where expectations differ markedly from those of the countryside, wherein the curtilage doctrine originated. *United States* v. *Romano,* 388 F.Supp. 101, 104 n.5 (E.D. Pa. 1975).

Recently, this Court has had occasion to examine the clash between the concept of privacy and the concept of curtilage in the related area of a warrantless arrest. In *United States* v. *Santana,* 427 U.S. 38 (1976), the police arrested defendant on a heroin possession charge as she attempted to retreat into the vestibule of her home from her previous position directly in her doorway. In response to defendant's challenge to this arrest, the Court held that she could not defeat an arrest set in motion in a public place by retreating to a private place:

> While it may be true that under the common law of property the threshold of one's dwelling is "private," *as is the yard surrounding the house,* it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in any area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States* . . . She was not merely visible to the public but was as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house. 427 U.S. at 42 [emphasis added; citations omitted]

The same reasoning and the same result should be applied to the seizure of contraband from "the yard surrounding the house." See also *United States* v. *Chadwick,* —— U.S. ——, 97 S.Ct. 2476, 2484 (1977) [diminished expectation of privacy concerning automobiles]; *Mancusi* v. *DeForte,*

392 U.S. 364, 368 (1968) [Fourth Amendment protections hinge on reasonable expectations of freedom from government intrusion, not upon property rights].

A number of jurisdictions have abandoned the curtilage concept in favor of a privacy analysis. See, *e.g., State* v. *Fluker,* 543 F.2d 709, 716 (9 Cir. 1976); *State* v. *Lopez,* 115 Ariz. App. 40, 563 P.2d 295 (Ariz. App. 1976); It has been recognized that "[n]ot every object near or attached to a dwelling is entitled to Fourth Amendment protection." *United States* v. *Romano,* 388 F.Supp. 101, 104 (E.D. Pa. 1975) [warrantless search of drainpipe attached to college residence upheld]. "The scope of Fourth Amendment protection should be based upon the degree of privacy an individual should reasonably expect." *United States* v. *Haughn,* 414 F.Supp. 37, 40 (D.N.J. 1976) [warrant for apartment search extended to landing thereof]. The elimination of the curtilage concept frees courts to ask if the items which were seized were in open view of passersby. *People* v. *Stein,* 51 Ill. App. 3d 421, 9 *Ill. Dec.* 372, 366 N.E.2d 629, 636-37 (Ill. App. 1977) [upholding warrantless seizure of evidence from an open trash can in defendant's backyard, visible through a cyclone fence]. Even more important, by abandoning the curtilage test a court may ascertain on the facts of each case the degree of privacy which the occupant has sought. *Wattenburg* v. *United States,* 388 F.2d 853 (9 Cir. 1968) [pile of stolen trees kept so close to lodge that court concluded defendant wished to retain a privacy interest in them]; *State* v. *Boone,* 293 N.C. 702, 239 S.E.2d 459 (N. C. 1977) [search of stolen tractor parked under shed and visible from adjacent school property held to be proper because there could be no reasonable expectation of freedom from government intrusion].

By utilizing a privacy approach it is relatively simple to ascertain whether constitutional protection should ex-

tend to the area surrounding a house. For example, in *Ochs* v. *State,* 543 S.W.2d 355 (Tex. Cr. App. 1976), *cert.* den. 429 U.S. 1062 (1977), the police commenced surveillance of defendants' house pursuant to an informer's tip. Observing marijuana being removed from the residence and loaded on a truck, the police arrested the defendants and seized the plants in the truck as well as others found in their home and garden. Defendants urged on appeal that the growth of foliage around their home indicated a reasonable expectation of privacy which could not be invaded absent probable cause. The court concluded that the defendants had no protective shield from the search, for the evidence revealed dense growth on only one side of the house. By contrast, in *United States* v. *Holmes,* 521 F.2d 859 (5 Cir. 1975), aff'd in pertinent part 537 F.2d 227 (5 Cir. 1976) (en banc) a search for marijuana was held to be impermissibly intrusive when police agents sneaked through dense undergrowth in a heavily wooded area to peer through a hole in a shed situated near defendant's home. Noting that this police trespass was based solely on conjecture—since there was no contraband visible from outside—the Fifth Circuit reversed. 521 F.2d at 869. As these cases illustrate, the degree to which an individual seeks to ensure his privacy has a direct corollary with the amount of constitutional protection to which he is entitled. See also *State* v. *Lopez,* 115 Ariz. App. 40, 563 P.2d 295 (Ariz. App. 1976) [carport in unfenced rear yard properly investigated following detection of odor of marijuana in that area]. An assertion of privacy must, however, be one which society is prepared to accept as reasonable. *State* v. *Stachler,* —— Haw. ——, 570 P.2d 1323 (Haw. 1977).

Quite consistent with the realities of modern living, there is no constitutionally cognizable intrusion in viewing that which can be seen from a public area. Since a

search implies a prying, it is not a search to observe items open to view. It is not a search for a police officer who observes a suspicious object or activity to undertake a closer observation thereof. *United States* v. *Johnson,* 561 F.2d 832 (D.C. Cir. 1977) (en banc), *cert.* den. —— U.S. ——, 97 S.Ct. 2953 (1977); *United States* v. *Wright,* 449 F.2d 1355, 1357 (D.C. Cir. 1971), *cert.* den. 405 U.S. 947 (1972). For example, in *State* v. *Detlefson,* 335 So. 2d 371 (Fla.App. 1976), a police officer observed what he believed to be marijuana plants growing on defendant's front porch. He walked up to the porch to take a closer look. Since the defendant could have no reasonable expectation of privacy in the front porch of his home, where presumably delivery men and others could see the plants, the appeals court held that "the entry into the yard and onto the porch to identify suspected contraband plainly visible in less detail from the street did not violate Fourth Amendment standards." *Id.* at 372.

Similarly, in *Commonwealth ex rel. Stoner* v. *Myers,* 199 Pa. Super. 341, 185 A.2d 806 (Pa. Super. 1962), the police went to a suspect's home to investigate the theft of a safe. They knocked on his back door but no one answered. As they turned to leave the officers noticed a small pile of debris near the doorstep, a foot or two from the house. The pile proved to contain some coins and a quantity of concrete dust which later was shown to match chemically with the lining of the safe. The court held that the discovery was not obtained by a search, but by the alert observation of the officers. Since there is no search when there is no prying, observed the court, it cannot be an illegal search and seizure to take what is lying open and visible to the naked eye. Moreover, a different result would be extremely detrimental for law enforcement:

> [I]t would be a wholesale departure from common sense and from serious concern for the preservation of the public peace and safety if police officers who enter an open driveway at a dwelling, and while knocking at the door, notice incriminating material lying on the ground, are forbidden to pick it up and use it, without going somewhere for a search warrant. *Id.* at 807-08.

Accord, *United States* v. *Sherriff*, 546 F.2d 604, 607 (5 Cir. 1977); *Ellison* v. *United States*, 206 F.2d 476 (D.C. Cir. 1953).

In addition to serving the needs of law enforcement and protecting the public interest against unreasonable searches, the expectation of privacy concept harmonizes well with the "open fields" doctrine. In the seminal case of *Hester* v. *United States*, 265 U.S. 57, 59 (1924), this Court settled the proposition that even if there is a trespass upon residence land "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." It must be noted that in *Hester* revenue officers had intruded onto private lands near a residence from which vantage point they observed an illegal transaction in moonshine whiskey.[1]

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[1] See also *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) [holding that health inspector who entered outdoor premises to conduct test for pollution was within the open fields doctrine of *Hester*]; *Monette* v. *United States*, 299 F.2d 847, 850 (5 Cir. 1962) ["The protection of the Fourth Amendment does not extend to the grounds"]; *Martin* v. *United States*, 155 F.2d 503, 505 (5 Cir. 1946) [enclosed or unenclosed grounds or open fields around houses are not entitled to Fourth Amendment protection]; *United States* v. *Sorce*, 325 F.2d 84, 86 (7 Cir. 1963), *cert.* den. 376 U.S. 931 (1964) [accord].

Analysis of the open fields doctrine demonstrates that it is simply one application of the *Katz* principle that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists. *People* v. *McClaugherty*, —— Colo. ——, 566 P.2d 361, 362-63 (Colo. 1977) (en banc); *People* v. *Slayton*, 503 F.2d 472, 477-78 (4 Cir. 1974). The owner or lessee of pasture land or a forest has no claim to Fourth Amendment protection therein because the public is unwilling to recognize that his assertion of privacy is a reasonable one. See, *e.g.*, *Wyss* v. *State*, —— Ark. ——, 558 S.W.2d 141 (Ark. 1977) [forest]; *People* v. *McClaugherty*, —— Colo. ——, 566 P. 2d 361 (Colo. 1977) (en banc) [rented pasture].

Since the yard around a home is a transitional area between zones of maximal (dwelling) and minimal (open field, public street) Fourth Amendment coverage, and since all yards are somewhat different, it is logical to evaluate intrusions into this space on a case by case basis. Several ground rules should govern the analysis. There must be a determination of whether an individual *manifested* an expectation of privacy: the evidence must point to tangible efforts to seek seclusion rather than merely a subjective feeling on the part of a defendant that he was entitled to have his property safe from public view. Basic to Petitioner's view is that an object on the dwelling property visible from the public street or from the quasi-public appurtenances to the dwelling (porches, sidewalks leading to doors) is within the public domain and a reasonable expectation of privacy cannot attach to it. For a further police investigation to proceed, however, the object must be clearly visible and must reasonably appear to be contraband from the officer's public vantage point. See, *e.g.*, *Cook* v. *State*, 134 Ga. App. 712, 215 S.E.2d 728 (Ga. App. 1975). The Fourth Amendment does not prevent seizures of contraband, dangerous instrumentalities and evidence of crime when it is readily visible and requires no search. *Ker* v.

California, 374 U.S. 23, 43 (1963). "The guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand." *State* v. *Smith,* 289 N.C. 143, 221 S.E.2d 247 (N.C. 1976). *Cf. Hall* v. *State,* 139 Ga.App. 488, 229 S.E.2d 12 (Ga. App. 1976) [the exception recognized for warrantless seizures of contraband, stolen goods or *per se* dangerous objects does not apply to pornography because of the necessity for a sophisticated value judgment].

The crucial remaining question is whether upon viewing contraband in an area in which no expectation of privacy has been manifested the police may seize it without a warrant. The New Jersey Appellate Division, holding that the O'Herrons' backyard was a constitutionally protected area, relied upon the plurality opinion of this Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) to answer this question in the negative. In Petitioner's view *Coolidge* does not control the present situation.

In *Coolidge* the police had ample probable cause and opportunity to obtain a search warrant for defendant's automobile. They were aware of its precise location and wanted to search it in connection with a homicide investigation, in order to examine objects "used in the Commission of said offense, now kept, and concealed in or upon" the vehicle. 403 U.S. at 447. Although the police did obtain a warrant, it was invalidated on appeal by the Supreme Court. As a result, the State sought to justify the warrantless seizure under the plain view theory.

The facts reveal several major distinctions between *Coolidge* and the present petition. First, the Manchester police had probable cause to secure a warrant prior to visiting defendant's premises: they knew exactly what they wanted, to whom it belonged, and where it would be. By

contrast, the Hazlet Police were pursuing an anonymous tip. Second, the object of the New Hampshire search was evidentiary: the police wished to scientifically analyze the interior of the car, hoping to corroborate the defendant's guilt of the crime. The Hazlet Police, to the contrary, were viewing contraband. Third, the police in *Coolidge* did not have a true "plain view" of what they ultimately desired. Although the vehicle was in the driveway, the police wanted the hidden contents, not the car itself.[2] On the other hand, the marijuana plants seized from the O'Herrons were in full and open view.

These factual distinctions assume tremendous significance when considered in light of *Coolidge's* explication of the law. Quite clearly, the *Coolidge* plurality was concerned both with the "evil" of "*any* intrusion in the way of search and seizure" and with the "objective" that "those searches deemed necessary should be as limited as possible." *Id.* at 467-68. Accordingly, if an initial "intrusion" can be separately justified, then the objects which later fall into "plain view" did not cause this "search" and may be seized without "convert[ing] the search into a general or exploratory one." *Id.* at 467. Under this formulation "plain view" is a subsidiary doctrine, an adjunct to a search already launched. In accord with this formulation, the New Hampshire police could not seize Coolidge's automobile without a warrant. Because they had ample prior probable cause and because they wanted to search through the contents of the car, the police had no justification for the warrantless seizure, apart from the fact that the car was

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[2] On appeal the State of New Hampshire argued that the police could have seized the car as an "instrumentality of the crime." *Id.* at 464. This clearly was not their stated purpose and appears to be a subsequent attempt at justification by appellate counsel.

in view.[3] A seizure under such circumstances would wholly abrogate the warrant requirement.

On the present petition, it is the State's view that, unlike *Coolidge*, there was no search and no constitutionally cognizable intrusion. The dictum in *Coolidge* speaks to the "true" plain view situation, that is, an inadvertent post-intrusion observation justified by a prior valid intrusion. See Comment, "'Plain View'—Anything But Plain: Coolidge Divides the Lower Courts," 7 *Loyola L. Rev.* 489 n.3 (1974). Here, however, there was a pre-intrusion observation into an area in which defendant had manifested no expectation of privacy. To enter such an area for a closer look does not violate defendant's privacy and is not a search in the *Coolidge* sense. In other words, the seizure in the present case was not undertaken as a "plain view exception" to the warrant requirement but rather as a case of "open view," to which no Fourth Amendment protection attaches. See *Harris* v. *United States, supra,* 390 U.S. at 236.

It is crucial for law enforcement for this Court to explore the difference between "open view" and "plain view." Our police must know whether they can seize objects lying in their full view, but arguably within someone's domain.[4]

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[3] By analogy in terms of a dwelling, the *Coolidge* seizure is the functional equivalent of commandeering a house without a warrant in order to search through its contents—on the theory that the house was in plain view.

[4] Petitioner is not here concerned with the standard for justifying warrantless entry into a dwelling based upon open view, except to note that exigent circumstances would have to exist. Compare *State* v. *Lane,* 572 P.2d 198 (Mont. 1977) with *United States* v. *Johnson,* 561 F.2d 832 (D.C.Cir. 1977) (en banc), *cert.* den. —— U.S. ——, 97 S.Ct. 2953 (1977).

Clearly, if the police can see such objects, the remainder of the community can also see them, thus posing an immediate danger of harm from the misuse of a dangerous or contraband object. Accordingly, a decision from this Court would be extremely valuable in terms of clarifying this difficult search and seizure question.

Petitioner further submits that *Coolidge* on its face does not apply to openly viewed contraband. 403 U.S. at 471-72. Accord, *State* v. *Smollar,* 357 F.Supp. 628, 633 (S.D. N.Y. 1972); *Cook* v. *State,* 134 Ga.App. 712, 215 S.E.2d 728 (Ga. App. 1975). Moreover, marijuana is "contraband easily destroyed," 403 U.S. at 472 n.28, and the Hazlet Police were quite justified on this basis in undertaking the seizure of the plants. Contraband creates an exigency. Its existence, with nothing more by way of use, offends the law and imperils society. *Cf. State* v. *Muldowney,* 60 N.J. 594, 602, 292 A.2d 26 (1972). Once police officers have identified material as contraband *per se,* they have far more than "probable" cause to seize. They have well-nigh "absolute" cause to take the contraband. In this regard, policemen who see marijuana growing are in a legal position identical to those who witness the commission of an offense, wherein warrantless arrest would be proper. *United States* v. *Watson,* 423 U.S. 411 (1976); *State* v. *Mark,* 46 N.J. 262, 271-72, 216 A.2d 377 (1966). See also *Gerstein* v. *Pugh,* 420 U.S. 103, 113 (1975).

Assuming, however, that this Court would apply *Coolidge* to the present facts, the Petitioner submits that the seizure meets the requirements. The police were in a legitimate vantage point to view the marijuana. The viewing was inadvertent in the legal sense, that is, the Hazlet Police did not have probable cause in advance to believe that the evidence would be found and did not initially plan to make a warrantless seizure. See Moylan, "The

Plain View Doctrine: Unexpected Child of the Great 'Search Incident' Geography Battle," 26 *Mercer L. Rev.* 1047, 1083 (1975). Although the Hazlet Police admittedly left the scene and returned some hours later, there is no requirement in the plain view doctrine of continuous observation. The officer may leave the scene, obtain a last bit of information (in this case, the narcotic officer's expert opinion) and then return to seize the contraband. *United States* v. *Wright,* 449 F.2d 1355 (D.C. Cir. 1971), *cert.* den. 405 U.S. 947 (1972); see also *Lovely* v. *State,* 351 So.2d 1114 (Fla. App. 1977).

The Appellate Division decision in the present matter relegates the observation of the contraband to a component of probable cause and denies it further operative effect. Plainly, this reasoning fails to provide guidance for police conduct in the field. To require the police to determine whether a "pre" or "post" intrusion observation has occurred forces officers to possess a knowledge of common law property concepts beyond even the knowledge of constitutional standards to which they are held. Clearly, the Appellate Division decision unduly burdens an investigator in the proper and effective performance of his duty. The result of the decision is a requirement that at least one police officer secure (without seizing) contraband in plain view, while a colleague seeks a warrant. This procedure erroneously presupposes the existence of almost limitless police resources. See *United States* v. *Wright, supra,* 449 F.2d at 1360 [the officer who sees evidence in open view is not "required to keep his eye glued to the knothole while he motions for help with a free hand"].

As particular support for our position, Petitioner relies upon *People* v. *Bradley,* 1 Cal. 3d 80, 81 Cal.Rptr. 457, 460 P.2d 129 (1969) and *People* v. *Hopko,* —— Mich. App. ——, —— N.W.2d ——, 23 *Crim. L. Rptr.* 2009 (Mich.

App. 1977). In *Bradley,* an informer of unknown reliability told the police that defendant was selling marijuana. The next day he told the officer that defendant was growing the plants by a fig tree at the rear of his residence. On the following evening, the officer investigated defendant's rear yard and spotted a marijuana plant growing in a keg near a fig tree some twenty feet from defendant's doorway. The officer had to come to within one foot of the plant to distinguish it, for it was partially obscured by the tree. The officer left, tried unsuccessfully to obtain a warrant, and then returned with other police, who seized the plants. On appeal the California Supreme Court followed *Katz,* asking whether defendant had exhibited an expectation of privacy in the plants and whether his expectation had been violated by an unreasonable government intrusion. The court upheld the seizure, relying on the fact that the plants, not totally covered, were in close proximity to an entrance to which numerous people, including deliverymen, would have access.

Similarly, in *Hopko,* the defendant, a cotenant in a two family home, was growing marijuana in his private vegetable garden. The garden occupied a designated area of the rear yard, which was divided in halves to permit each tenant the sole use of his portion. Noticing the marijuana, which could be viewed from a common area between the gardens, the other tenant flagged down a patrol car and reported his discovery to Officer Siegrist. The officer approached to within 15 feet and spied what appeared to be marijuana at the end of a row of corn and sunflowers. Siegrist summoned members of the narcotics squad, who confirmed the officer's opinion and then seized the plants. On appeal the Michigan court found that defendant had a qualified but not total expectation of privacy, ruling that ". . . we do not believe that defendant could reasonably expect his cotenant to shut his eyes to what could obviously be observed from the cotenant's garden plot." 23 *Crim. L.*

Rptr. at 2009. Simply because an area is designated as part of the curtilage, this does not mean that the occupant has a reasonable expectation of total and exclusive privacy therein. Although the court found that the Fourth Amendment would protect a person from a warrantless entry for the purpose of digging up his garden in the hope of finding buried contraband, "its shadow does not extend so wide as to shroud from view 4-foot high plants which could clearly be observed and identified by the cotenant or his invitees . . ." *Id.* The court justified the warrantless seizure on the grounds that the very existence of the plants meant that a possible felony was being committed in the officer's presence. Further, although marijuana plants "unlike automobiles, do not run away, they are nevertheless quickly removed by pulling them from the ground." *Id.* at 2010.

In light of all of the foregoing, Petitioner urges this Court to grant certiorari in order to elucidate the inherent conflict between the concept of constitutionally protected areas and the doctrine of the right of privacy; to explore the differences between open view and plain view; and to resolve difficulties in applying the *Coolidge* plurality opinion, particularly with respect to the doctrine of inadvertence, in light of *Harris* v. *United States.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

(Filed—November 4, 1977)

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-3817-76

STATE OF NEW JERSEY,

Plaintiff-Appellant,

—vs—

EDWARD O'HERRON, JR., and KATHLEEN O'HERRON,

Defendants-Respondents.

Argued: September 15, 1977—Decided: Nov 4 1977

Before Judges Bischoff, Kole and Gaulkin.

On appeal from Superior Court, Law Division, Monmouth County.

Mr. Daniel Louis Grossman, Deputy Attorney General of New Jersey, argued the cause for appellant (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

Appendix A

Mr. Paul A. Sherman argued the cause for respondents.

The opinion of the Court was delivered by

GAULKIN, J.S.C., Temporarily Assigned.

The State appeals, by leave granted, from an order entered prior to trial suppressing two marijuana plants seized without a warrant from the rear yard of defendants' home. Based upon that seizure defendants have been indicted for possession of marijuana. N.J.S.A. 24:21-20a (4).

The record before the trial court consisted of a brief account by the State of the circumstances of the seizure, which defendants stipulated they would be unable to dispute. The uncontroverted facts are that on July 20, 1976 the Hazlet Police Department received an anonymous call that marijuana plants were growing in a vegetable garden at 169 8th Street, West Keansburg. Two officers were dispatched to that address, where they saw a garden and determined that it should be further investigated by detectives.

At approximately 11:15 the next morning, Detectives Allen and Mulligan went to the address and observed the garden. From the roadway they were able to see "large green plants growing in the garden." In order to get a closer look Detective Allen went around the back and came through the property behind the defendants' house. From that vantage point off the defendants' property, the detective observed two plants growing at the rear of defendants' property which from his past experience he identified as marijuana.

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The detectives notified headquarters and additional officers were dispatched to the scene. The officers entered defendants' garden, further examined the plants and gathered them as evidence. The record indicates no attempt made at the time of the seizure to identify the owners or occupants of the premises, or to locate them for interrogation, arrest or otherwise.

In the trial court the State, which had the burden to justify the warrantless seizure (*State* v. *Allen,* 113 N.J. Super. 245 (App. Div. 1970)), advised that it was "relying on the plain view doctrine" as enunciated in *Harris* v. *United States,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). Defendants principally relied on what they urged were limitations on the doctrine set forth in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), reh. den. 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971). Following argument and principally in reliance upon *Coolidge,* the trial court suppressed the evidence upon findings that the observing of the plants by the police was not inadvertent and that no exigent circumstances excused the requirement of a warrant to seize.

In this court the State again contends that the seizure was justified under *Harris,* which holds "that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." 390 U.S. at 236, 88 S.Ct. at 993, 19 L.Ed.2d at 1069. Defendants respond, as they did in the trial court, that under *Coolidge* the "plain view" exception requires both "inadvertent" discovery of evidence and "exigent circumstances" to justify a warrantless seizure and that neither appears here. In rebuttal the State contends that those requirements of *Coolidge* repre-

sent the views of only a plurality of the United States Supreme Court and are therefore not binding on this court and ought not to be followed. Further the State argues that inadvertence and exigent circumstances are both established by the stipulated facts.

Consideration of the scope and application of the "plain view" doctrine here must proceed with the recognition that the term "plain view" is imprecise and has been used to describe a variety of circumstances having quite different legal implications. As Justice Stewart noted in *Coolidge,*

> . . . it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal. 403 U.S. at 465, 91 S.Ct. at 2037, 29 L.Ed.2d at 582.

"Plain view" is sometimes used to describe situations in which items are exposed to public view in a public place or in an otherwise constitutionally unprotected location; their observation and seizure are authorized without a warrant. See, *e.g., State* v. *McKnight,* 52 N.J. 35 (1968). A second application of "plain view" is to situations in which officers have lawfully intruded into a constitutionally protected place where they observe the items in question; such "plain view" observation and subsequent seizure require no warrant, as where the initial lawful intrusion is by consent (*e.g., State* v. *Braeunig,* 122 N.J. Super. 319 (App. Div. 1973); *State* v. *Mark,* 46 N.J. 262 (1966)), to effect an arrest (*e.g., State* v. *Jordan,* 115 N.J.

Super. 73 (App. Div. 1971), certif. den. 59 N.J. 293 (1971)), or in hot pursuit (*e.g., State* v. *Canola,* 135 N.J. Super. 224 (App. Div. 1975), modified, 73 N.J. 206 (1977)).

On the other hand objects may come into "plain view" only after and as a result of an unlawful intrusion into a constitutionally protected zone; evidence of such observation and any warrantless seizure resulting must be suppressed. See, *e.g., State* v. *Rice,* 115 N.J.Super. 128 (App. Div. 1971); *State* v. *Allen, supra; State* v. *Baker,* 112 N.J. Super. 351 (App. Div. 1970); *United States* v. *Chadwick,* —— U.S. ——, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

Simply describing an object as being in "plain view", then, is not sufficient to justify its warrantless seizure. The common strand in the cases cited is that a warrantless seizure may be made of items in "plain view" in a location where the officer has a right to be; but that the presence of the items cannot alone supply justification for a police officer's presence at that location. As Justice Stewart said in *Coolidge,*

> . . . the doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. 403 U.S. at 466, 91 S.Ct. at 2038, 29 L.Ed.2d at 583.

This case presents yet a different kind of "plain view". Here the marijuana plants were located in defendants' backyard but were observed from adjoining property and the officers' intrusion onto defendants' property is sought to be justified solely on the basis of the antecedent obser-

vation.[1] The State urges in essence that whatever is lawfully observed without a warrant may be seized without a warrant, regardless of its location. We find that position to be without the support of reason or persuasive authority.

In the kind of "plain view" situation presented here, the observation itself is not in issue, for a mere visual observation without physical intrusion generally does not constitute a "search" within the meaning of the Fourth Amendment. See *State* v. *Smith,* 37 N.J. 481 (1962); *United States* v. *Lee,* 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); *United States* v. *McMillon,* 350 F.Supp. 593 (D.D.C. 1972). But the Fourth Amendment by its terms protects against both "unreasonable searches and seizures"; that protection "is *prima facie* equitable with the obtaining of a valid warrant and the mere existence of probable cause does not itself excuse the warrant requirement." *State* v. *Hannah,* 125 N.J.Super. 290, 294 (App. Div. 1973), certif. den. 64 N.J. 499 (1974). A "plain view" observation made, as here, without intrusion can surely furnish probable cause for a seizure. That it does not alone justify a warrantless intrusion to seize was stated with simple clarity by Justice Stewart in *Coolidge*:

> . . . plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.[2] 403 U.S. at 468, 91 S.Ct. at 2039, 29 L.Ed.2d at 584.

[1] The State does not suggest that the police entered defendants' property to arrest or interrogate defendants or for any purpose other than to seize the plants. Compare *State* v. *Griffin,* 84 N.J. Super. 508 (App. Div. 1964); *United States* v. *Anderson,* 552 F.2d 1296 (8th Cir. 1977).

A number of cases have applied those principles to facts similar to those presented here. In *United States* v. *Cop-*

[2] Although the State urges that the plurality discussion of "plain view" in *Coolidge* is not binding and ought not be followed, our reading of the separate *Coolidge* opinions satisfies us that their differences are largely with Justice Stewart's requirement of "inadvertent" discovery, which he found necessary to avoid legitimizing an initial intrusion "bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it . . ." 403 U.S. at 471, 91 S.Ct. at 2040, 29 L.Ed.2d at 586. See *Brown* v. *State,* 15 Md.App. 584, 292 A.2d 762 (Ct. Sp. App. 1972) at n. 39. But where the "plain view" is made without an intrusion at all, it is entirely irrelevant whether the police make their observation inadvertently or intentionally. See *Commonwealth* v. *Adams,* 234 Pa. Super. 475, 341 A.2d 206, 209 (1975). It is therefore unnecessary to decide whether we must or should accept the "inadvertence" requirement stated by the *Coolidge* plurality with respect to post-intrusion "plain view" situations. See Note, "The Supreme Court, 1970 Term", 85 *Harv. L. Rev.* 3, 237 (1971). Whatever doubts might exist as to the "inadvertence" requirement of *Coolidge,* they do not bring into question what Justice Stewart called "a long line of cases" which ". . . make it clear beyond doubt that the mere fact that the police have legitimately obtained a 'plain view' of a piece of incriminating evidence is not enough to justify a warrantless seizure." 403 U.S. at 471, 91 S.Ct. at 2041, 29 L.Ed.2d at 586, n. 27.

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len, 541 F.2d 211 (9th Cir. 1976) cert. den. —— U.S. ——, —— S.Ct. ——, —— L.Ed2d —— (1977), officers made a warrantless seizure from a private airplane after making observations from outside of marijuana debris inside. The court found that the visual observation was not a "search", that the observation did not violate any reasonable expectation of privacy and that the viewing of the debris constituted adequate probable cause for the issuance of a warrant. But the court went on to hold that the warrantless seizure was not justified by that observation alone, and that the warrant requirement would be excused only if "exigent circumstances" existed; analyzing that question, the court found the circumstances, including particularly the mobility of the plane, were in fact "exigent".

In *Fixel* v. *Wainwright,* 492 F.2d 480 (5th Cir. 1974) officers investigating defendant's suspected drug activities observed that, as persons came and left his home, defendant periodically went into his back yard to a small shaving kit. The officers entered the backyard without a warrant and seized the kit which was found to contain narcotics. The court suppressed the evidence, holding that although the observation together with the other circumstances constituted adequate probable cause, nevertheless

> It is absolutely clear that [the officer] unlawfully encroached on a protected area when he actually entered the back yard, seized the black shaving kit and searched it. Regardless of how suspicious the agents were that the contraband was located on the premises, this fact alone does not justify a search of petitioner's premises in the absence of a search warrant. *Id.* at 483.

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Similarly in *United States* v. *Resnick,* 455 F.2d 1127 (5th Cir. 1972), modified, 549 F.2d 1390 (1972), officers investigating a silver currency melting scheme made surveillance of a building from a distance of from 75 to 100 feet away, observing the reflection of a furnace. Further observations were made later that day and again the following day, when the officers entered the building and seized evidence without a warrant. The court suppressed the evidence, finding the officers' observations did not justify the warrantless seizure:

> . . . the scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer. The interposition of magistrate between officer and citizen to see if there really was probable cause was readily available, and no emergency prevented resorting to him for normal judicial process. *Id.* at 1132.

In *McDonald* v. *United States,* 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), police officers suspected defendant of engaging in gambling activities and observed him over a period of several months. While outside the rooming house in which he lived they heard the sound of an adding machine, whereupon they entered the building, stood on a chair in a common hallway and looked through a transom, observing defendant engaged in a numbers operation. The police then entered the room without a warrant. The United States Supreme Court ordered the suppression of the evidence thus obtained:

> We cannot be true to that constitutional requirement [of a warrant] and excuse the absence of a search warrant without a showing by those who seek exemption from a constitutional mandate that

> the exigencies of the situation made that course imperative. 335 U.S. at 456, 69 S.Ct. at 193, 93 L.Ed. at 158.

In *Pendleton* v. *Nelson,* 404 F.2d 1074 (9th Cir. 1968), an officer observed marijuana through a garage window and immediately seized it. The court of appeals reversed the lower court determination sustaining the search, stating:

> The seizure was not incident to Pendleton's arrest earlier that day and was not pursuant to a search warrant. The view of the narcotics through the window may have provided probable cause to obtain a search warrant but, since no exigent circumstances were shown to exist, such view did not authorize a seizure without such a warrant or consent. *Id.* at 1077.

A further exemplar is *State* v. *Davis,* 228 N.W. 2d 67 (Sup. Ct. Iowa 1975), where the court reversed the admission into evidence of marijuana seized without a warrant following a viewing into defendant's apartment through a window. Distinguishing the facts from other kinds of "plain view", the court described the case as involving "a 'pre-intrusion' view of material in an area protected by an expectation of privacy from a vantage point where the viewer had a right to be". The court then quickly disposed of the contention that such a view permitted a warrantless seizure:

> To argue such a view, in and of itself, allows a warrantless intrusion is to argue probable cause alone is sufficient to allow a warrantless search and seizure. *Id.* at 72.

The same result was reached in *Brown* v. *State, supra,* where, in ordering suppression of stolen goods seized without a warrant from defendant's apartment after an observation from a common hallway, the court summarized the different kinds of "plain view" cases in the following language:

> The chameleon-like quality of the phrase "plain view" stems from its loose employment to describe these visually similar but legally distinct situations. Although they share the common denominator of a non-searching, sighting of evidence in "open view," the non-intrusion observation needs no further justification for a seizure; the pre-intrusion observation does need some additional legal predicate for the intrusion necessary to effect the seizure; and the post-intrusion—or truly "Plain View"—observation has already validly surmounted the intrusion hurdle. 292 A.2d at 774-775.

See also *Chapman* v. *United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); *Jones* v. *United States,* 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); *Johnson* v. *United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1947); *Taylor* v. *United States,* 286 U.S. 1, 52 S.Ct. 446, 76 L.Ed. 951 (1931); *Wattenburg* v. *United States,* 388 F.2d 853 (9th Cir. 1968); *Niro* v. *United States,* 388 F.2d 535 (1st Cir. 1968); *Barnato* v. *State,* 88 Nev. 508, 501 P.2d 643 (1972); *State* v. *Brown,* 1 Or. App. 322, 461 P.2d 836 (1969); *cf. Commonwealth* v. *Adams, supra.*

The State has offered no authority directly in support of its contrary assertion that a pre-intrusion "plain view" observation justifies a warrantless intrusion and seizure. The reliance it places on *Harris* v. *United States, supra,*

is misconceived. In *Harris* the item seized was in "plain view" in defendant's vehicle which the police lawfully entered following its impoundment; in the formulation of *Brown, supra, Harris* is a case in which the observation "has already validly surmounted the intrusion hurdle."

Although not relied upon by the State, we must, however, note *People* v. *Bradley,* 1 Cal.3d 80, 81 Cal. Rptr. 457, 460 P.2d 129 (1969) and *United States* v. *Wright,* 449 F.2d 1355 (D.C.Cir. 1971), cert. den. 405 U.S. 947, 92 S.Ct. 986, 30 L.Ed. 2d 817 (1972), both of which may be read to support the State's contention here. But in addition to the peculiar and perhaps distinguishing facts of those cases, we observe that subsequent California decisions do not appear to give *Bradley,* a 4-3 decision, any broad reading. See *Lorenzana* v. *Superior Court of Los Angeles County,* 9 Cal.3d 626, 108 Cal.Rptr. 585, 511 P.2d 33 (1973); *People* v. *Sneed,* 32 Cal.App.3d 535, 108 Cal. Rptr. 146 (1973). And the holding in *Wright* was over the strenuous dissent of Judges Wright and Bazelon that "no court has ever so held"; it was specifically rejected in *United States* v. *Pacheco-Ruiz,* 549 F.2d 1204 (9th Cir. 1976). In any event, reading them most favorably to the State, we find both *Bradley* and *Wright* at variance with the principles and case law we have discussed and therefore unpersuasive.

We hold, then, that a "plain view" observation made without intrusion into a constitutionally protected location does not itself justify a warrantless intrusion and seizure. Here the intrusion was into defendants' backyard, a place which has long been recognized as enjoying constitutional protection at least in the absence of any showing of some invitation or authorized access to the public. See, *e.g., United States* v. *Molkenbur,* 430 F.2d 563 (8th Cir. 1970), cert. den. 400 U.S. 952, 91 S.Ct. 244, 27 L.Ed.2d 258 (1970); *Hobson* v. *United States,* 226 F.2d 890 (8th Cir. 1955). The State does not urge, nor does the record suggest, that defendants invited or permitted access to others into their backyard. Compare *People* v. *Mullins,* 50 Cal. App.3d 61, 123 *Cal. Rptr.* 201 (1975).

The State contends, however, that by permitting visual observation of the marijuana plants from outside the premises defendants implicitly abandoned any reasonable expectation of privacy from physical intrusion; they rely upon *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) which discusses Fourth Amendment protection in terms of "reasonable expectation of privacy". This contention, if adopted, would necessarily overrule the principle summarized in *Coolidge* that "plain view alone is never enough to justify the warrantless seizure of evidence"; for if "reasonable expectation of privacy" dissipates upon "plain view", then every warrantless intrusion following a "plain view" observation is lawful.

The clash between the concepts of "plain view" and "reasonable expectation of privacy" was noted in *Comment,* "Privacy in Search and Seizure Law", 25 *Hastings L.J.* 575, 585 (1974):

> Privacy was to be determined by subjective criteria, but plain view was still couched in terms of abstract criteria, namely, whether the place is open to surveillance by the public. As a result, there arose an inherent inconsistency in their legal definitions, for one could conceivably have a reasonable expectation of privacy yet still be legally spied upon based on plain view. This meant, in effect, that after the *Katz* decision there was an implicit contradiction be-

tween the legal concepts of privacy and plain view. At pp. 585 and 586.

See also *State* v. *Stanton*, 7 Or. App. 286, 490 P.2d 1274 (1971); *People* v. *Sneed, supra.*

The case law has not resolved the inconsistency as the State would have us resolve it. The contrary result has in fact been reached explicitly or implicitly in all the post-*Katz* cases, discussed above, in which a warrantless intrusion was found not justified by a pre-intrusion "plain view" observation. See particularly *Fixel* v. *Wainwright, supra,* and *Wattenburg* v. *United States, supra,* both of which involve warrantless intrusions into backyards; and *United States* v. *Coplen, supra,* where the court specifically found defendant had no reasonable expectation of privacy from visual observation but remained protected from warrantless intrusion in the absence of exigent circumstances. We thus cannot regard the "long line of cases" referred to in *Coolidge* as overruled by the earlier *Katz* holding.

The remaining question is whether "exigent circumstances" excuses the obtaining of a warrant here. The seized marijuana was planted and growing when it was observed; there is no suggestion that at any time during the police investigation the defendants were at home, or that the police apprehended an imminent harvest of the plants; the police investigation, conducted over a two-day period, disclosed nothing which indicated any special urgency; and indeed the police did not act with any show of urgency up to the time of the seizure. In short, there are no facts whatsoever which would permit a conclusion that the State has sustained its heavy burden of proving exigent

circumstances.[3] See *State* v. *Helton*, 146 N.J. Super. 98 (App. Div. 1975), aff'd. 72 N.J. 169 (1977); compare *State* v. *McNair*, 60 N.J. 8 (1972). The State here proffers only that "contraband *per se* creates an exigency"; that contention is directly in conflict with accepted principle. See *Coolidge* v. *New Hampshire, supra; Chapman* v. *United States, supra; Johnson* v. *United States, supra; Fixel* v. *Wainwright, supra.*

We therefore affirm the order of suppression entered below and remand the matter to the trial court for further proceedings.

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ELIZABETH MCLAUGHLIN
Clerk

[3] We note that at the hearing below the Deputy Attorney General did not urge any "exigent circumstances"; in fact, in response to the court's question, "What are the exigent circumstances here?", she replied, "Your Honor, I would submit that this situation really does not apply to this case. Our case is the easiest case of plain view."

APPENDIX B

Order of the Supreme Court of New Jersey Denying Motion for Leave to Appeal

SUPREME COURT OF NEW JERSEY

M-377 SEPTEMBER TERM 1977

STATE OF NEW JERSEY,

Plaintiff-Movant,

vs.

EDWARD O'HERRON, JR., & KATHLEEN O'HERRON,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 17th day of January, 1978.

STEPHEN W. TOWNSEND
Acting Clerk